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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536

File:

LIN 022 122 52902

Office: NEBRASKA SERVICE CENTER

Date:

MAY 22 2003

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a community youth soccer program. It seeks to employ the beneficiary permanently in the United States as a sports instructor. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is May 16, 2001. The beneficiary's salary as stated on the labor certification is \$39,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated May 6, 2002, the director required additional evidence to establish the petitioner's ability to pay the

proffered wage as of the priority date and continuing to the present. The RFE required either the petitioner's federal income tax return, annual report or audited financial statement for 2001, in addition to the 2000 Form U.S. 1120, U.S. Corporation Income Tax Return, already in the record.

Counsel submitted the petitioner's 2001 Form U.S. 1120, and it reported taxable income before net operating loss deductions and special deductions of \$3,971, less than the proffered wage. Schedule L of the federal tax return showed a difference between current assets of \$3,476 and current liabilities of \$964, for net current assets of \$2,512, less than the proffered wage. Schedule L, also, revealed a cash deficit of (\$824). Counsel urged attention to the petitioner's bank statements for periods ending December 31, 2000 to November 30, 2001.

Counsel presented a Contract for Services executed July 24, 2002 (contract) and explained the third party which it introduced:

Upon the approval of [the beneficiary's] permanent residence, he will begin working for [the petitioner] as a Youth Soccer Coach. At that time, he will be assigned to the Rosemount Area Athletic Association, Inc. ("Rosemount"). Rosemount is already contractually obligated to pay [the petitioner] the amount of \$40,000 per year to the services of [the beneficiary], once he is a permanent resident....

Rosemount clearly has the ability to pay [the petitioner] \$40,000 per year. Attached please find [the beneficiary's] W-2 forms for the years 2000 and 2001, wherein Rosemount paid [the beneficiary] \$50,293 in 2001 and \$48,375 for 2000 for services rendered.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present and denied the petition.

Two (2) affidavits on appeal now state that the contract, executed after the priority date, existed as an oral agreement (agreement) from December 6, 2000 (agreement), before the priority date. Counsel asserts that the agreement was legal and binding:

On or around December 6, 2000, [the petitioner] and Rosemount entered into an oral contract whereby [the petitioner] would provide Rosemount the services of [the beneficiary] as a Youth Soccer Coach, contingent upon [the beneficiary] becoming a permanent resident....

Said agreement was not put into writing until July 2002 because neither party felt that it was necessary and because it was a legally binding oral contract witnessed by multiple parties....

Because of the agreement between [the petitioner] and Rosemount, it is axiomatic that [the petitioner] then also had the ability to pay the proffered wage at the time the priority date was established and continuing through the present time.

First, the petitioner responded to the RFE by initiating the consideration of the written contract, but did not offer the affidavits for the claim of an oral agreement until the appeal. Under 8 C.F.R. § 103.2 (b):

(2) *Submitting secondary evidence and affidavits - (i) General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, ... pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Procedurally, it is too late to introduce the affidavits on appeal. The RFE requested the evidence of the ability to pay in line with 8 C.F.R. § 204.5(g)(2). Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Bureau. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Second, the petitioning corporation and Rosemount are separate entities. Counsel, notwithstanding, considers it axiomatic that the agreement and contract make the wage payments, income, and assets of Rosemount available to support the obligations of the petitioning corporation. In fact, no agreement or contract, wage payment, income, nor asset appears on any annual report, audited

financial statement, or tax return of the petitioning corporation at the priority date.

The response to the RFE, with the agreement and contract, offered only a promissory note or an unaudited financial statement. Unaudited financial statements as proof of the ability to pay the proffered wage at the priority date are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), *supra*, p. 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Also, the contract expressly reserves the condition subsequent of termination at will, by either the petitioner or Rosemount, during 60 days before July 24 of every year until lawful permanent residence is obtained. This defeasibility further contradicts the claim that the petitioner has the ability to pay the proffered wage, either at the priority date or continuing until the beneficiary obtains lawful permanent residence.

Counsel's insistence that Rosemount is contractually obligated to the petitioner does not conform to the regulatory standard of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I & N Dec. 503, 506 (BIA 1980).

Moreover, contrary to counsel's primary assertion, the Bureau may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow show additional funds beyond those of the tax returns and financial statements. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972.)

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg.

Comm. 1967) is misplaced. It relates to a petition filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

After a review of the federal tax returns, contract, agreement, and bank statements, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.